



DEPARTMENT OF THE ARMY

U.S. Army Corps of Engineers
WASHINGTON, D.C. 20314-1000

REPLY TO
ATTENTION OF:

CECC-T

30 May 1996

MEMORANDUM FOR ALL MAJOR SUBORDINATE COMMAND, CENTER, DISTRICT,
LABORATORY AND SEPARATE FOA FREEDOM OF
INFORMATION ACT OFFICERS

SUBJECT: Release of Government Estimates Under the Freedom of Information Act (FOIA).

1. This guidance establishes procedures for responding to FOIA requests for *Government estimates* and *Government estimate back-up data*. The *Government estimate* and *Government estimate back-up data*, prepared for construction contracts and modifications, are sensitive procurement information and should in many cases be withheld under the FOIA.

2. Definitions:

a. *Government estimate*. The *Government estimate* consists of a title page, signature page and bid schedule.

b. *Government estimate back-up data*. The *Government estimate back-up data* is the detailed cost data, which includes production and crew development methodology, labor, equipment and crew back-up files, subcontractor quotes and all other data identified on MCACES software as detail sheets.

c. Fair market price determinations, under the Small Business Program (FAR 19.202.6), will be treated as *Government estimates* for purposes of this guidance.

d. Supporting documents that are publicly available as part of the solicitation, such as plans, specifications and project description, or that contain no cost information, such as sketches, soil borings and material classifications, are not part of the *Government estimate or back-up*.

3. *Government estimates* and *Government estimate back-up data* are intra-agency memoranda which may be withheld under FOIA Exemption 5, "confidential commercial information" and "deliberative process" privileges. Proper use of Exemption 5, however, requires a showing that release of information will harm the Government's interests. Therefore, requests for *Government estimates* and *back-up data* will be reviewed on a case-by-case basis, based on the following guidance, to determine whether release will harm the Corps' interests. In reviewing requests the FOIA Officer will seek the assistance of the cost engineer. If the FOIA Officer determines that release will harm the Corps' interests, the information will be withheld.

a. Before Contract Award.

(1) When sealed bidding is used, neither the *Government estimate* nor the *Government estimate back-up data* should be released prior to bid opening. FAR 36-203(c), 36.204. It is well established that release of *Government estimates* and *back-up data* before contract award would harm the interests of the Government. FAR 36.203, Federal Open Market Committee v. Merrill, 443 U.S. 340 (1979), Morrison-Knudson v. Dep't of the Army, 595 F. Supp. 352 (D.D.C. 1984), *aff'd* 762 F.2d 138 (D.C. Cir. 1985).

(2) The *Government estimate* will normally be released when bids are opened. In some instances, however, the *Government estimate* will not be released at that time, such as when all bids received are non-responsive and a procurement is envisioned.

(3) In negotiated procurement for construction under FAR Parts 15 and 36, the *Government estimate* should not be released prior to contract award, except that Government negotiators may disclose portions of the *Government estimate* in negotiating a fair and reasonable price, see FAR 36-203(c).

(4) *Government estimate back-up data* should not be released.

b. After Contract Award Through Contract Completion.

(1) The *Government estimate* may be released.

(2) The *Government estimate back-up data* should not be released. Release of *Government estimate back-up data* after contract award and before completion of a construction contract, may also result in harm to the Government. The *Government estimate back-up data* is used to develop cost estimates for modifications and claims. Release of the *back-up data* prior to contract completion provides the contractor with the details of the Government's position and would allow the contractor to develop a biased price proposal. This could harm the Government's ability to negotiate a fair and reasonable price for the modification or claim, putting the Government at a serious commercial disadvantage. Moreover, knowledge of the construction methods contemplated by the Government might reduce the contractor's incentive to discover less expensive methods. This could also reduce the contractor's incentive to locate and charge out materials at a lower cost, or to achieve project goals using less labor and equipment. Quarles v. Department of the Navy, 893 F.2d 390, (D.C. Cir 1990). Taylor Woodrow International, Ltd. v. Department of the Navy, No. 88-429R, (W.D. Wash. Apr. 6, 1989).

c. After Contract Completion (and after all claims have been resolved).

(1) Generally, the *Government estimate back-up data* may be released after the contract is completed. Situations where the information should not be released include, multiple-phased projects where a series of similar contracts are awarded in sequence, and frequently recurring contracts. In those cases, each *Government estimate* is based upon the same *back-up data* and the same analysis of how to perform the work.

4. Bid Protests and Litigation. This guidance should be considered when the Corps is involved in bid protests or litigation. If appropriate and to the extent possible, Counsel should have the *Government estimate* and /or the *Government estimate back-up data* placed under a "protective order." There are valid reasons for not releasing the *back-up data* supporting the *Government estimate* to the contractors. In the case of a bid protest, there is a possibility that the contract could be readvertised or converted to a negotiated procurement. Release of the *back-up data* would provide bidders with the detailed cost data that supports the *Government estimate*. If, however, the apparent low bidder protests the reasonableness of the *Government estimate*, the Command may provide the details of the *Government estimate* and *Government estimate back-up data*, to the protestor only, upon receipt of complete details of the protestor's estimate. See, EFARS 33.103(S-101). If the protest is not sustained and the proposal is readvertised, all bidders are entitled to have the same information as the protestor.

5. If you have any questions concerning this guidance, please contact Mr. Richard Frank at (202)761-0023.

FOR THE COMMANDER:

A handwritten signature in black ink, appearing to read "Lester Edelman", with a stylized flourish at the end.

LESTER EDELMAN
Chief Counsel